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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 913.

HARRY CIVILETTI,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PAUL O'DWYER,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The above named petitioner prays that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court (R. 31) rendered in the above case on December 6, 1945, confirming a decision of the Tax Court of the United States which had sustained a determination of the Commissioner of Internal Revenue of a deficiency in petitioner's income tax for the calendar year 1940 (R. 16).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347 (a)).

The Opinions of the Court Below.

The opinion of the Tax Court (R. 11) is officially reported in 3 T. C. 1274. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 27-30) is reported in 152 Fed. (2nd) 332.

Statute and Regulations Involved.

The statute involved is Section 107 of the Internal Revenue Code defining compensation for services rendered for a period of five years or more. The relevant portion is printed in the appendix at page 17.

Summary Statement of Matter Involved.

The petitioner qualified in 1929 as substituted co-trustee of two testamentary trusts. In each year, from 1929 to 1940, he accounted for the income to the life beneficiary and deducted and retained the statutory commissions for collecting income which aggregated some Seventeen thousand ($17,000.00) Dollars.

In 1940 the petitioner received, upon an intermediate account pursuant to a decree of the Surrogates' Court of the State of New York, the sum of $31,025.12 as principal commissions for services rendered to the principal of the two trusts. No previous payment for or on account of administering the principal had been received by or paid to the petitioner.

The petitioner contends that the commissions allowed by the Surrogates' Court represented compensation for services rendered from the commencement of his duties to the time of the rendition of his account in connection with the administration of the principal of the trusts; that this sum constituted compensation received for per-

sonal services on completion of such services rendered over a period of more than five (5) years and that he is therefore entitled to the benefits of Section 107 of the Internal Revenue Code.

The Court below denied this contention and held that the compensation received in 1940 was not paid on completion of the services.

Question Presented.

Did the Circuit Court of Appeals err in holding that the receiving commissions awarded to a New York testamentary trustee in 1940 for services rendered over a period of more than five years, did not constitute compensation paid on completion of services within the meaning of Section 107 of the Internal Revenue Code?

Facts.

The case was tried in the Tax Court on an agreed statement of facts.

The petitioner is a New York trustee who qualified in 1929 as a substituted co-trustee of two trusts under the will of Adelaide E. Harris who died in 1913, a resident of the State of New York. These trusts provided for the payment of the income to the daughter of the decedent with remainder over of the principal, upon her death, to the grandson and granddaughter of the decedent (R. 12).

The petitioner received the principal of the trusts and administered them during the years from 1929 through 1940. The amount of principal received in each trust was in excess of $1,530,000 (R. 22). In 1940 the petitioner filed an intermediate account in the Surrogates'

Court of New York and in December of that year he was allowed, pursuant to a decree of the Court, the principal commissions of $31,025.12. These commissions were allowed under Section 285 of the New York Surrogates' Court Act and were payable only after an accounting and the allowance thereof by the Surrogates' Court.

During the period accounted for the petitioner had rendered in each year thereof, his annual account of income to the life beneficiary and had deducted and retained his statutory commission for collecting and paying out the income of the trusts. The aggregate of these income commissions over the period was approximately Seventeen thousand ($17,000.00) Dollars and it is conceded and so stated by the Tax Court that unless taken annually these commissions were deemed to be lost (R. 15).

The petitioner allocated in his income tax returns for the calendar year 1940 the $31,025.12 over the years 1929 through 1940 and computed his tax upon the rates prevailing in those years. The Commissioner disallowed the computation and determined a deficiency of $4,181.79 and the Tax Court sustained the respondent's determination (R. 16).

The Court below sustained the determination of the Tax Court (R. 27).

The Decisions Below.

The Tax Court based its opinion on the ground that the trustee's services, as to principal and as to income, were not separable; that therefore, the income commissions received over the period from 1929 through 1940 were payments on account of the total compensation of the trustee and that the petitioner therefore did not receive at least ninety-five (95%) percent of the total compensation for services as trustee in the tax year 1940. The Tax Court

further said that inasmuch as it reached a decision on this point "it becomes unnecessary to decide whether the compensation received by petitioner in 1940 was received 'only on completion of such services' within the meaning of the statute" (R. 16).

The Circuit Court conceded that the half commission received by the petitioner in New York represented payment "for the services theretofore rendered". It denied relief to the petitioner on the ground that under Section 107(b), the half commission had not been received on completion of the trustee's services. It indicated that if the case had arisen under the amendment (Section 139 of the Revenue Act of 1942) which eliminated the completion factor that the petitioner would be entitled to the relief.

Reasons Relied On For Allowance of This Writ.

The Writ of Certiorari should be issued because the decision of the Court below is in error and conflicts in principle with the applicable decisions of this Court holding that a tax law should be construed liberally to give the relief it was intended to provide (*Bonwit Teller & Co.* v. *United States*, 283 U. S. 258).

The Writ of Certiorari should also be issued for the reason that this case presents an important aspect of the administration of the Revenue Law which has not been but which should be decided by this Court and which affects a large number of taxpayers.

Section 107 of the Internal Revenue Code was enacted by the Revenue Act of 1939 and was amended under the Revenue Act of 1942. The application of the section to trustee's commissions has been considered only in the case at bar and in *Smart* v. *Comm.*, 152 Fed. 2nd 333 (C. C. A.

2nd). A petition for a Writ of Certiorari is now pending in the latter case before this Court. The Tax Court in both cases adopted the strict rule of construction that in determining the compensation of a trustee for personal services both income and principal commissions were to be merged and the required percentage computed thereon.

Principal commissions in the case of testamentary trustees are allowed generally by order of the Court upon an accounting and Courts do not permit frequent accountings because of the expense involved to the estate, *Smart* v. *Commissioner*, *supra*. Therefore, the testamentary trustee receives his principal commission at the end of an extended period of time during which he has performed his services. Income commissions however are generally retained by the trustee upon collection of income. As a consequence the total income commissions during such period will exceed the permissive percentage under the section.

Under the rule laid down in the Tax Court a trustee, except in rare instances would be denied the benefits intended by the taxing statutes for he would be unable to allocate his lump sum principal commissions over the statutory period and compute his tax upon the rates prevailing in the respective years.

In the instant case the Court below has rejected the rule in the Tax Court but has adopted the equally narrow construction that in the case of a trustee, services within the meaning of Section 107 are not complete until the termination of the trust.

In the *Smart* case, *supra*, the Court below seems to have retained the strict rule of construction laid down by the Tax Court although it expresses a doubt in the absence of some authoritative ruling.

The decisions of the Court below in both cases raise substantial questions of Federal law which should be settled by this Court and these questions will continue to arise in various cases until this Court renders an authoritative ruling thereon.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit in the above case.

Dated, New York City, March 5, 1946.

HARRY CIVILETTI, Petitioner,

By: PAUL O'DWYER,
Counsel for Petitioner.